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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAUL EMMANUEL RIVERA, Defendant and Appellant.	B197178 (Los Angeles County Super. Ct. No. LA 049659)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Kirschner, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Saul Rivera appeals from his convictions on two counts of murder and one count of attempted murder. We affirm.

BACKGROUND

The amended information charged Rivera and two codefendants, Richardo Martinez and Jesse Martinez, with the murders of Miguel Zapata (count 1) and David Zapata (count 2) in violation of Penal Code section 187, subdivision (a),[1] and with the attempted murder of Edwin Leiva in violation of section 187, subdivision (a), and section 664 (count 3). The information alleged with respect to all counts that the murders and the attempted murder were willful, deliberate, and premeditated within the meaning of section 664, subdivision (a), and were serious felonies within the meaning of section 1192.7, subdivision (c). It further alleged with respect to counts 1 and 2 the special circumstances of multiple murders (§ 190.2, subd. (a)(3)) and that the defendants were active participants in a criminal street gang and intentionally killed the victims to further the activities of the gang (§ 190.2, subd. (a)(22). As to all counts and all defendants, the information alleged that a principal personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d), and (e)(1)), and that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)). It was also alleged as to all counts that Rivera personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d)).

Rivera pleaded not guilty and denied the allegations. His trial was severed from that of his codefendants. A jury found Rivera guilty on all counts and found all

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

allegations true except for the allegations that Rivera personally used and discharged a firearm, which were found not true.[2]

The trial court sentenced Rivera to life in prison without the possibility of parole plus 25 years to life, determined as follows: (1) on count 1, life without the possibility of parole, plus 25 years to life based on the firearm allegation; (2) on count 2, a concurrent term of life without the possibility of parole, plus 25 years to life based on the firearm allegation; and (3) on count 3, a concurrent term of life with the possibility of parole, plus 25 years to life for the firearm enhancement. The court also ordered victim restitution of $9,876.30 (§ 1202.4, subd. (f)), imposed a restitution fine of $2,000 (§ 1202.4, subd. (b)), and imposed but stayed a parole revocation fine of $2,000 (§ 1202.45). The court credited Rivera with 737 days of presentence custody.

The evidence introduced at trial showed the following facts: On February 2, 2005, at roughly 5:30 p.m., 16-year-old George Ortega was seated outside at a Wienerschnitzel restaurant in Canoga Park. His girlfriend Lisa Anderson and his friends David Zapata, Miguel Zapata, and Edwin Leiva were with him; some were seated, while others were standing.[3] Ortega was a member of a street gang, the Vanowen Street Locos. David, Miguel, and Leiva were members of the Temple Street gang.

At some point, an Hispanic male walked past the tables and then back again, fixing Ortega's group with a disrespectful stare that Ortega interpreted as a challenge.[4] The male walked away and conferred briefly with two other Hispanic males who had just crossed the street; the three were later identified as Rivera, codefendant Jesse Martinez, and codefendant Richardo Martinez. Richardo, Jesse, and Rivera then came toward

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[2] That is, the jury found that it was true that *a principal* personally used and discharged a firearm causing great bodily injury and death, but the jury found it was not true that *Rivera* personally used or discharged a firearm.

[3] Because Jesse and Richardo Martinez and David and Miguel Zapata share last names, we will refer to them by their first names.

[4] The evidence indicated that while the male doing the staring was within earshot, Miguel referred to him as a "Cagona," a disrespectful term for a member of the Canoga Park Alabamas gang. The evidence was conflicting as to whether Miguel made that utterance before or after the staring began.

Ortega's group. One of them approached Miguel and asked him, "Where are you from?" (meaning, in this context, "What gang do you belong to?")[5] Miguel responded by identifying the gang of which he was a member, "Temple Street." The individual who had approached Miguel replied, "Fuck Temple." He then identified his own gang as "Canoga[] Park," while his confederates stood behind him and made hand signals indicating that they too were members of the Canoga Park Alabamas street gang. Ortega, who had been sitting, jumped to his feet and stated his gang affiliation as "Vanowen Street" or "Calle Vanowen." Miguel became agitated, and he and Ortega "kind of nodded to each other." The male who had approached Miguel then pulled out a handgun, "shot at Miguel, and . . . just started shooting from there. He started just shooting randomly."

Miguel and Leiva ran. David was shot where he sat, and he fell to the ground. A window of a nearby restaurant shattered. Ortega jumped over some bushes and dropped to the ground, "playing dead." After the shooting stopped, the shooter and his confederates fled the scene. Ortega approached David and found that he had been shot in the head. Miguel went to the front counter of the Wienerschnitzel and asked that someone call 911; then he collapsed, immobile. The medical examiner testified that David died from a gunshot wound to the head. Miguel died from a gunshot wound to his torso; he suffered three additional gunshot wounds to various parts of his body.

In his postarrest interview, Rivera admitted that he was one of the three individuals who approached Ortega's group at the Wienerschnitzel, but he denied that he was the shooter. He did not testify at trial.

Ortega identified Rivera as the shooter at trial, but in a photographic lineup less than 24 hours after the shooting he identified Rivera as "the guy that was next to the shooter." Anderson did not identify Rivera as the shooter either in photographic lineups

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[5] In his testimony at trial, Ortega identified Rivera as the individual who approached Miguel and asked where he was from, but he also said that the person who approached Miguel and asked where he was from was the shooter. The jury, however, rejected the allegation that Rivera was the shooter.

or at trial. Leiva initially failed to identify Rivera in a photographic lineup, but when Leiva was shown the photographic lineup a second time he identified Rivera as the shooter.

The prosecution sought to convict Rivera on any of three alternative theories, all of which were covered by the trial court's instructions to the jury. First, the prosecution argued that Rivera was the shooter, so he was directly liable as the perpetrator of both the murders and the attempted murder. Second, the prosecution argued that if Rivera was not the shooter, he was guilty as an aider and abetter of both the murders and the attempted murder because he acted with the intent or purpose of encouraging or facilitating their commission. Third, the prosecution argued that if Rivera was not the shooter and did not intend to encourage or facilitate murder or attempted murder, he was still guilty as an aider and abetter because the murders and the attempted murder were natural and probable consequences of any one of four other offenses that, the prosecution argued, Rivera did intentionally encourage or facilitate, namely, (1) disturbing the peace, (2) assault, (3) assault with a deadly weapon, and (4) assault with force likely to produce great bodily injury.

DISCUSSION

I. Voluntary Manslaughter

Rivera argues that the trial court erred by failing to instruct sua sponte on voluntary manslaughter based on the theory that he acted "in the actual but unreasonable belief that he needed to protect himself from" Ortega's group. We disagree.

Even in the absence of a request, the trial court has a duty to instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In particular, in a murder trial the court must instruct on voluntary manslaughter if "the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 201.)

Rivera argues that such an instruction was required in this case because there was evidence that (1) after the male who approached Miguel said "Fuck Temple" and "Canoga[] Park," Ortega jumped to his feet, (2) Miguel became agitated, and (3) Ortega and Miguel "kind of nodded to each other," and (4) "[i]t's common knowledge that gang members are typically armed, guns, knives, whatever." That is not sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that Rivera actually (though perhaps unreasonably) believed in the need to shoot in self-defense. In his postarrest interview (which was introduced at trial) Rivera never claimed to have such a belief. On the contrary, in his postarrest interview, when asked what he thought was going to happen after his group identified themselves as Canoga Park Alabamas ("You probably think it's gonna be a fist fight or something. Did you think it was gonna be a shoot out? What did you think was gonna happen?"), Rivera said he thought "[t]hey were gonna start fighting." Rivera did not testify at trial.

On this record, any inference that Rivera believed he needed to defend himself with deadly force would have been pure speculation. Consequently, no instruction on voluntary manslaughter was warranted.

II. Refusal to Close the Courtroom

At trial, Rivera moved for a protective order concerning his testimony, seeking both to exclude "any potential gang members" and "the media" from the courtroom during his testimony and to have his testimony sealed. He argued that if his testimony implicated other gang members (namely, his codefendants) in the killings, then he or his family might be killed in retaliation. The trial court denied the motion, and on appeal Rivera contends that the ruling constituted prejudicial error. We disagree.

The trial court reasoned that "there is a balancing that the court must engage in," weighing the "very, very strong presumption in favor of open trials" against any countervailing considerations. The court went on to observe that Rivera's motion to sever his trial from that of his codefendants included a summary of his statement to the police, in which he identified codefendant Jesse as the shooter. Rivera's identification of Jesse as the shooter was therefore "in the public domain already." The prosecutor also

pointed out that at the preliminary hearing, at which all three defendants were present, a police officer testified that Rivera had identified Jesse as the shooter. Because "that bell cannot be unrung," the court denied the motion to close the courtroom, but the court said it would "entertain a motion to seal" Rivera's testimony if he decided to testify. The only reason the court was reluctant to agree to seal the testimony in advance was that the court was uncertain that it had the authority to do so. But the court stated that if it could grant the motion to seal, it would do so—"If, in fact, I can do it, I will." The court also offered defense counsel the opportunity to present legal authorities on the point on an expedited basis ("[I]f you want to do the research quickly, give me your authorities. I'll be happy to look at that. We have a little bit of time."). Rivera ultimately decided that if the courtroom was not going to be closed, then he would not testify, regardless of whether his testimony was sealed.

The presumption in favor of open trials "'may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" (*Waller v. Georgia* (1984) 467 U.S. 39, 45, quoting *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501, 510; see also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1309 & fn. 10.)

The trial court did not err in refusing to exclude "potential gang members" and "the media" from the courtroom, because Rivera failed to identify an overriding interest sufficient to justify such an exclusion. Rivera's codefendants were already aware, by their presence at the preliminary hearing, that Rivera had identified Jesse as the shooter. That information was therefore already available to the codefendants' friends, relatives, and fellow gang members. Rivera has failed, both in the trial court and on appeal, to articulate any reason why his testimony at trial would have placed him in any more danger than he already faced as a result of the preliminary hearing. Consequently, Rivera has failed to demonstrate an overriding interest sufficient to overcome the presumption in favor of open trials.

III. Natural and Probable Consequences

Rivera argues that the trial court erred when it included disturbing the peace and simple assault as target crimes in the instruction on aider and abettor liability for natural and probable consequences, because "it was not reasonably foreseeable that either of these misdemeanor offenses would lead to murder under the circumstances of this case." Assuming for the sake of argument that the trial court erred by including those target crimes in the natural and probable consequences instruction, we conclude that any such error was not prejudicial.

Rivera argues, to the contrary, that the error is reversible per se because "the trial court's instruction that murder is a natural and probable consequence of misdemeanor offenses that are not inherently dangerous lessened the prosecution's burden of proving, beyond a reasonable doubt, that it was reasonably foreseeable that murder would result from this confrontation[.]" The argument fails because it mischaracterizes the instruction at issue. The trial court did not instruct the jury that murder is a natural and probable consequence of simple assault or breach of the peace. Rather, the court instructed the jury that it could convict Rivera of the murders and the attempted murder if the jury determined that (1) Rivera aided and abetted a simple assault or breach of the peace, and (2) the murders and the attempted murder were natural and probable consequences of the simple assault or breach of the peace that Rivera aided and abetted. The instructions thus left the natural and probable consequences determination to the jury and did not impermissibly lessen the prosecution's burden of proof.

The trial court errs if it instructs the jury on a theory of liability that is either legally erroneous or not supported by substantial evidence. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) In either case, however, the error is harmless if there is "a basis in the record to find that the verdict was actually based on a valid ground." (*Id.* at p. 1129.)

Assuming for the sake of argument that the natural and probable consequences instruction was unsound either legally or factually, the error was harmless because there is a basis in the record to find that the verdict was not based on a natural and probable

consequences theory at all. The jury found true the special circumstance that Rivera intentionally killed the victims while he was an active participant in a criminal street gang. The instruction on that special circumstance unequivocally informed the jury that in order to find that special circumstance true, they first had to find that Rivera "intentionally killed the victim[s]." The jury also found the multiple murders special circumstance true, and the instructions stated that the jury could not do so without first finding that either Rivera was the actual killer or he acted with intent to kill. Thus, although the jury was apparently uncertain about Rivera's *role* in the crimes (hence the jury's rejection of the allegation that Rivera was the shooter), the jury's findings show no uncertainty about Rivera's *intent*—either Rivera was the shooter or he was an aider and abettor *who shared the shooter's intent to kill*. Either way, the jury found Rivera guilty of the murders and the attempted murder either as the perpetrator or as a direct aider and abettor, not on a natural and probable consequences theory. Consequently, any error in the natural and probable consequences instruction was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.